

2010 WL 7427270 (Mass.Super.) (Trial Motion, Memorandum and Affidavit)  
Superior Court of Massachusetts.  
Plymouth County

Kristine M. KAIDEN, et al.,

v.

Frederick ZIMONJA.

No. CV2010-00707.  
2010.

**Plaintiff's Opposition to Defendant's Motion to Dismiss**

Plaintiffs, By their attorneys, Sarah W. Peterson, Esq. (666307), [India L. Minchoff](#), Esq. (652456), Law Offices of Russo & Minchoff, 123 Boston Street, 1st Floor, Boston, MA 02125, 617/740-7340 telephone, 617/740-7310 facsimile.

Plaintiffs, Kristine M. Kaiden and Richard A. Hallberg, oppose Defendant's Motion to Dismiss pursuant to [Mass.R.Civ.P. 12\(b\)](#) (6). As grounds hereof, Plaintiffs state the following:

**ARGUMENT**

From the outset it should be noted that contrary to Defendant's characterization, this action does not 'arise out of a' litigation pending in the Plymouth County Probate and Family Court, styled as *In re: Estate of Sonja Busi*, Docket No. 09P0270 ("the Will Contest"); rather, the instant action stems from Defendant's wrongful actions as they pertain to inter-vivos transfers relating to Sonja Busi's assets. Further, the instant action does not seek the same relief which is being sought by (or which is available to) Plaintiffs in the Will Contest. Defendant's argument that Plaintiffs also lack standing to assert a legal malpractice claim, and that their counts for breach of contract and fiduciary and confidential duties are wholly dependent upon their claim for legal malpractice is similarly flawed. As set forth more fully below, each of Plaintiffs' claims are appropriately before this Court.

**I. PLAINTIFFS' CLAIMS ARE NOT SUBJECT TO RELIEF IN THE WILL CONTEST.**

The gravamen of this case is Defendant's financial exploitation of the deceased, Sonja Busi ("the deceased" or "Ms. Busi"). Ms. Busi died on January 25, 2009, at age 82. She had no children and had outlived her husband and only sibling, Plaintiffs' mother. Ms. Busi's long standing wishes with respect to her estate were to provide for her only niece and nephew, with some small provisions also being made to animal-related charities.

In 2002, Ms. Busi met the Defendant. At the time, Ms. Busi was suffering from [depression](#), was mentally declining, often confused, and experiencing hallucinations. Shortly after meeting Defendant, Ms. Busi requested his assistance for financial planning. Defendant, through his [abuse](#) of her trust and exertion of undue influence was able to negate Ms. Busi's wishes by effectuating a plan which financially benefited himself, his Church, <sup>1</sup> the charities of his choice, and his business associates. Defendant [abused](#) his fiduciary and confidential relationship to, among other things, obtain control over Ms. Busi's affairs, to the exclusion of her only surviving family members, Plaintiffs, Kristine Kaiden and Richard Hallberg.

Ms. Busi's largest asset was real estate located on Route 3A in Scituate, which included her former home as well as a significant parcel of property which was approved for a twelve-lot subdivision. With the guidance and upon the suggestion of Defendant, this property was conveyed by deed into The Busi Investment Trust (the "Trust") prior to Ms. Busi's death. Plaintiffs have

alleged that Ms. Busi did not have the requisite capacity to engage in this conveyance and that the establishment of the Trust was the result of the undue influence exerted by Defendant. Factual allegations plausibly suggesting Ms. Busi's lack of capacity and undue influence were asserted. *See supra*, *see also* Amended Complaint

All assets held under the Trust passed to the trust beneficiaries, outside of the decedent's "probate estate." Consequently, the Trust and its assets, contrary to Defendant's assertions, are not part of the currently pending Will Contest since the Probate Court's subject matter jurisdiction, in the context of a Will Contest pursuant to Probate Court Rule 16, is limited to whether the Will being offered for probate should be accepted. In other words, in a Will Contest the Probate Court has no authority to determine the disposition of assets; its sole function is to determine the validity of the Will. Although the natural consequence of disallowing a will typically results in a disposition of assets to the contestants in a Will Contest, the assets are only those assets governed by a decedent's Will. Thus, while the grounds for a challenge to a will are often the same employed to challenge the creation of an inter-vivos instrument of conveyance (i.e., capacity, undue influence, duress, fraud), the relief available in a Will Contest attaches only to those assets included in a decedent's probate estate. In other words, the Probate Court does not gain authority to adjudicate the validity of an inter-vivos transfer simply because the bases for challenging such transfer may be similar or the same.<sup>2</sup> In this case since the Trust is outside of the probate estate, the Will Contest, even if successful, will not determine whether the Trust is valid nor will it determine whether the deed of conveyance into the Trust should be rescinded.<sup>3</sup>

While some of Plaintiffs' claims asserted in the instant action could be adjudicated in the Probate Court, through a separately filed Complaint and not pursuant to the pending Will Contest, the Superior Court has jurisdiction to adjudicate Plaintiffs' claims and Plaintiffs are entitled to select the forum.<sup>4</sup> It should also be mentioned that Plaintiffs have moved for an interdepartmental transfer of the Will Contest to the Superior Court. Counsel for Defendant did not oppose the transfer nor did he seek a transfer of the instant case to the Probate Court. Further, and despite Defendants' argument that Plaintiffs' claims should be tried together in the Probate Court, he argues in a footnote that "consolidation [in the Superior Court] would only complicate the proceedings." In short, Defendant's Motion is merely a ruse aimed at preventing Plaintiffs from litigating this action in the Superior Court on its merits.

Finally, in response to Defendant's claim that under influence and interference with inheritance are identical counts, Plaintiffs state the following. Every litigant is entitled to pursue any cause of action available, irrespective of whether the stated causes of action would provide the same relief. This is particularly true when, as here, the asserted counts require different standards of proof. Further, Plaintiffs have alleged sufficient facts to support these causes of action,<sup>5</sup> which are grounded in tort, and which the Superior Court has original jurisdiction over. *See*, [M.G.L. Chapter 212, §4](#).

## II. PLAINTIFFS HAVE STANDING TO ASSERT A CLAIM FOR LEGAL MALPRACTICE.

Plaintiffs' malpractice count arises from different actions and is grounded upon several theories, each of which survive the standard for dismissal under [M.R.C.P., Rule 12\(b\)\(6\)](#). In the first instance, Plaintiffs, as heirs at law, assert this claim on behalf of Ms. Busi's estate. To this end, Plaintiffs are not required to allege or prove that any duty was owed to them by Defendant. As heirs at law Plaintiffs are entitled to pursue a claim for malpractice in the name of the decedent, a claim which survives the decedent's death. Moreover, such claim can be pursued without first having to remove an executor or an administrator when he or she would be unable to pursue the claim by reason of his or her interest or otherwise.<sup>6</sup> Here, Defendant is the nominated executor, thus, even if his appointment were ultimately allowed, he would be unable to bring this action since it would be against himself. Plaintiffs, therefore, are entitled to assert this claim wherein they allege Defendant breached his duty to the decedent.<sup>7</sup> Further, Plaintiffs Amended Complaint recites allegations setting forth such a breach with respect to the creation of the Trust<sup>8</sup> as well as the transactions relating to the property held under the Trust, *see infra*.<sup>9</sup> Moreover, Plaintiffs, contrary to Defendant's position, are not required to prove, at the pleading stage, that such breach occurred. It is enough at the pleading stage that a plaintiff allege factual allegations plausibly suggesting an entitlement to relief. *Iannacchino v. Ford Motor Company*, 451 Mass. 632 639 (2008). Defendants reliance on *Ryan v. Ryan*, a case reviewing a motion for judgment notwithstanding the verdict and

holding that plaintiffs had not presented clear and persuasive proof at trial to sustain their claims, is therefore misplaced. *Ryan v. Ryan*, 419 Mass. 86, 92 (1994). As is self-evident, As is self-evident, *Ryan* proceeded to a trial on the merits.<sup>10</sup>

Plaintiffs also assert their malpractice claim in their own right. In the absence of an attorney-client relationship, a party can sustain a claim for legal malpractice as long as it establishes that an attorney owed a duty of care to that party. *Macht v. Estate of Dobkin*. 19 Mass. L. Rep. 318 (Mass. Super. Ct. 2005). Further, “[i]t is generally recognized that ‘an attorney owes a duty to nonclients who the attorney knows will rely on the services rendered.’” *McCarthy v. Landry*, 42 Mass. App. Ct. 488, 490 (1997), quoting, *Robertson v. Gaston Snow & Elv Bartlett*, 404 Mass. 515, 524, cert. denied, 493 U.S. 894 (1989). This duty, however, is not imposed when such an independent duty would potentially conflict with the duty the attorney owes to his or her client. *Macht v. Estate of Dobkin*. 19 Mass. L. Rep. 318 (Mass. Super. Ct. 2005). Here, Plaintiffs' individual claims for malpractice demonstrate that not even a potential conflict existed and that Plaintiffs were individuals whom Defendant knew would rely on his services.

Plaintiffs' individual claims for malpractice, which are all factually driven, stem primarily from the following actions. First, it results from Defendant's misconduct in exerting undue influence and fraud over the decedent in the preparation, execution and funding of the Trust. Second, and in the event the Trust and deed are not rescinded, Defendant's actions in allowing a duly executed Purchase and Sale Agreement, executed with a colleague of Defendant, to lapse, thereby financially harming the value of the Trust, provide Plaintiffs with a cause of action. Plaintiffs have alleged that Defendant represented Ms. Busi, as legal counsel, in the sale of her real property, Defendant failed to market the property for sale but rather directly contacted a real estate developer whom he knew and had business dealings (Amended Complaint, ¶36). Further, Defendant allowed that contract to lapse at a time when the real estate market began to decline and subsequently entered into a second Purchase and Sale agreement for the property at a significantly lower purchase price<sup>11</sup> (Amended Complaint, 137). Thirdly, Defendant contracted with Ms. Busi for a three-percent commission for his representation of her (and the Trust) in the sale of her real estate, by a fee agreement signed the day before the deed to the property was to be delivered pursuant to the terms of the original Purchase and Sale Agreement (Exhibit E to Amended Complaint).

In addition, upon Ms. Busi's death Defendant officially accepted the role of successor trustee of the Busi Investment Trust (Amended Complaint, ¶39), although he served as Trustee prior to her death, and he continues to represent the Trust in the sale of the real estate, pursuant to a 3% broker's commission. Acting in the roles as attorney, trustee, and broker created a conflict of interest and also created duties from Defendant to beneficiaries of the Trust. “A trustee must exercise good faith and act solely in the interests of the beneficiaries in administering the trust [and] must lay aside self-interest. ... There can be no divided loyalty.” *Boston Safe Deposit & Trust Co. v. Lewis*, 317 Mass. 137,140(1944).

Defendant breached his duties, among other ways, by acting negligently and/or intentionally in advocating for his own self-interest by providing himself with a three percent commission and he negligently failed to enforce the sale of the property under the first Purchase and Sale Agreement. As beneficiaries of the Trust, a fact known to Defendant, Plaintiffs were intended beneficiaries of the real estate sale and they have been harmed by Defendant's actions, injury that was foreseeable to Defendant. Based on the foregoing, it is clear that Plaintiffs have standing to assert a cause of action for Legal Malpractice, under several theories, against Defendant.

### **III. PLAINTIFFS' COUNTS FOR BREACH OF FIDUCIARY AND CONFIDENTIAL DUTIES AND BREACH OF CONTRACT ARE NOT DEPENDENT ON THEIR MALPRACTICE CLAIM.**

Defendant's also argues that Plaintiffs' counts for breach of fiduciary and confidential duty fail because they are dependent on the survival of Plaintiffs' claim for malpractice. Notwithstanding the fact that Plaintiffs' claim for legal malpractice is appropriately pled by Plaintiffs, Defendant's argument fails. Most significantly, Defendant's argument fails because Plaintiffs have asserted allegations setting forth the fact that Defendant acted as (1) power of attorney, (2) health care proxy, (3) advisor. and (4) agent

for Ms. Busi. Each of these relationships establish, as a matter of law, fiduciary and confidential relationship. Plaintiffs have further pled allegations supporting Defendant's breach of his duties pursuant to these relationships.

Plaintiffs' breach of contract claim is also not wholly premised on the attorney-client relationship since, as set forth in the Amended Complaint, Plaintiffs assert that Defendant made representations and promises to the decedent in order to extract personal financial gain.

## CONCLUSION

For the foregoing reasons, Plaintiffs, Kristine Kaiden and Richard Hallberg request that this Court deny the Defendant's Motion to Dismiss.

### Footnotes

- 1 Frederick Zimonja, in addition to being an active member and “elder” at the Christ Lutheran Church, was also a member of the Church's Endowment Committee and at one time the congregation's Vice President.
- 2 Defendant, arguably again because of his misunderstanding of the matter being litigated in the Will Contest, also argues that Plaintiffs' claim for Tortious Interference with an Expectancy is not properly before this Court. In support of his position, Defendant cites to *Labonte v. Giordano*, 426 Mass. 319,320-321 (1997). Defendant, however, mischaracterizes the Labonte decision by indicating that it stands for the proposition that Plaintiffs must obtain their relief by contesting Ms. Bus's Will in Probate Court. The *Labonte* case, however, actually sets forth Plaintiffs' right to pursue the instant action insofar as it acknowledges that a will contest, even if successful, would not resolve a parties claims to assets held outside the probate estate and that Tortious Interference with Expectancy is a cause of action “long recognized” in this Commonwealth. *Id.* at 323.
- 3 It should also be mentioned that, contrary to Defendant's interpretation of the Amended Complaint, nowhere in the Amended Complaint do Plaintiffs rescission of the Will or any other relief relative to the Will. Thus, Defendant's representation that the Probate Court has sole jurisdiction to rescind the Will is, although correct, superfluous.
- 4 Not all of Plaintiffs' claims could be adjudicated in the Probate Court. For example, the Probate Court arguably could not determine Plaintiffs' claim for legal malpractice.
- 5 The Amended Complaint alleges that Ms. Busi was an **elderly**, infirm and unsophisticated woman and that Defendant was her fiduciary. It also alleges that Defendant exerted undue influence over Ms. Busi in the creation of the Trust and that his influence over Ms. Busi continued until the time of her death.
- 6 See M.G.L. c. 230 Section 5.
- 7 In the event this Court finds that an executor or administrator must be appointed, and subsequently refuse to pursue the instant claim, before Plaintiffs can sue as heirs, Plaintiffs, as contestants will seek the appointment of an executor.
- 8 Defendant cannot insulate himself from prosecution of a legal malpractice claim merely by alleging that he did not personally draft the subject documents. It is undisputed that decedent sought out the legal counsel of Defendant regarding the Trust, Defendant participated and counseled the decedent in the creation of the Trust, Defendant was present during its execution, and that he also served as a notary for the transfer of assets into Trust. Moreover, whether Defendant can defeat this claim by establishing no attorney-client relationship existed with Ms. Busi cannot be resolved at this stage; the existence of an attorney-client, which can be implied from the conduct of the parties and need not be expressed, is a question to be resolved by the trier of fact, *Page v. Frazier*, 388 Mass. 55, 61-62 (1983).
- 9 As discussed below and in the Amended Complaint, the day before the Trust property was to be conveyed to a third party, Defendant created a client fee agreement which provided him a 3 % commission for the sale. During this same period of time Defendant was controlling all of the decedent's affairs as her power of attorney. Further, the decedent was not competent and was residing in assisted living, with regular hospital stays necessitated due to her condition. Rhetorically, how could the decedent have been competent enough to execute such a fee agreement yet, at the same time, not capable of managing any other aspect of finances?
- 10 In *Ryan* the Court found that it was proper to submit to case to the jury and to determine the adequacy of the evidence on a motion for judgment notwithstanding the verdict. *Id.* at 89, fn 7.
- 11 The second Purchase and Sale Agreement remains in effect.